IN THE

Supreme Court of the United States

October Term, 1963

No. 1053

SELDEN C. HIGGINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

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SELDEN G. HOOPER,

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vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Claims entered in the above-entitled case on January 24, 1964.

Opinions Below.

The opinion of the Court of Claims entered on January 24, 1964, is printed in Appendix A, *infra*, p. 1 *et seq.* and is reported in *326 F. 2d 982* (1964).

Jurisdiction.

The final judgment of the Court of Claims was entered on January 24, 1964, when it rendered its opinion denying petitioner's motion for summary judgment, dismissing petitioner's petition and granting respondent's cross-motion for summary judgment.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1255(1) (1958) providing for review of

cases in the Court of Claims by writ of certiorari granted on petition of claimant against the United States.

Question Presented.

Petitioner was a retired officer of the United States Navy, not on active duty, who was subjected to trial by naval court martial, over his objection, and sentenced to dismissal and to forfeiture of all pay and allowances in 1957. After exhaustion of all review procedures provided for by the Uniform Code of Military Justice, petitioner's conviction and sentence by the court martial were approved and ordered executed by the President on January 7, 1961, and payment of petitioner's retirement pay was discontinued as of such date.

After discontinuance of his retirement pay, petitioner brought suit for retirement pay accruing after January 7, 1961, in the Court of Claims on the ground that the court martial by which he was convicted and sentenced lacked jurisdiction.

The question presented is as follows:

Whether a retired officer of the United States Navy, drawing retirement pay, who is not on active duty, is subject to court martial in the continental limits of the United States for alleged crimes committed on private property when the civil courts are open and functioning.

Constitutional Provisions and Statutes Involved.

The constitutional provision involved is Article I, Section 8, Clause 14, granting to Congress the power to provide for government of the military forces which reads so far as pertinent here:

> "Section 8. The Congress shall have power * * *
>
> To make Rules for the government and Regulation of the land and naval forces."

The statutory provision involved is the purported exercise of this constitutional grant of power by Congress in enacting what is known as the Uniform Code of Military Justice, 64 Stat. 107, 109, 10 U. S. C. Sec. 802 (1958).

The pertinent provision of that Code involved here Article 2(4) which provides in part:

"The following persons are subject to this Chapter:

* * * * *

(4) Retired members of a regular component of the Armed Forces who are entitled to pay."

Statement.

The statement of facts in the opinion of the Court of Claims, Appendix A, *infra*, page 1 *et seq.* is not contested by petitioner.

In 1957, petitioner was a retired Rear Admiral of the United States Navy, not on active duty, drawing retirement pay. He was living in Coronado, California, and entitled to retirement pay in the amount of $433.83 per month.

Petitioner was charged with homosexual misconduct occurring after his retirement on private property in Coronado, which was not a part of any military or naval reservation. Over petitioner's objection, and without being recalled to active duty, he was subjected to a naval court martial which imposed a sentence of dismissal and forfeiture of all retirement pay and allowances.

During the pendency of the court martial, petitioner filed suit against the Commandant of the naval district in which the court martial was being held. This suit

was filed in the United States District Court for the Southern District of California, Southern Division, for injunctive and declaratory relief. The federal court denied petitioner any relief and entered findings of fact, conclusions of law and judgment in accordance therewith which is reported in *Hooper v. Hartman*, 163 F. Supp. 437 (1958 S.D. Calif.).

Petitioner appealed from the decision of the District Court to the United States Court of Appeals for the Ninth Circuit. The decision of the District Court was affirmed *per curiam* on the sole ground that petitioner had not exhausted the remedies of review of his conviction afforded by the Uniform Code of Military Justice. *Hooper v. Hartman*, 274 F. 2d 429 (9th Cir. 1959).

Petitioner was a retired Rear Admiral and it was therefore mandatory under the Uniform Code of Military Justice that his court martial conviction be reviewed by a Board of Review and the United States Court of Military Appeals because of his flag rank.

Subsequent to the decision of the United States Court of Appeals in *Hooper v. Hartman, supra*, petitioner's conviction and sentence were affirmed by military Boards of Review and the United States Court of Military Appeals which held that the court martial had jurisdiction over petitioner and that Article 2(4) of the Uniform Code was constitutional. *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958); and 11 U.S.C.M.A. 128, 28 C.M.R. 352 (1960).

On January 7, 1961, the President of the United States approved the conviction and sentence of petitioner and the Government stopped paying retirement compensation to petitioner.

Upon cessation of his retirement pay, petitioner sued in the Court of Claims for accrued retirement pay on the ground that the court martial convicting and sentencing petitioner was without jurisdiction because Article 2(4) of the Uniform Code of Military Justice was unconstitutional.

Petitioner's claim was founded upon 61 Stat. 881, 10 U. S. C. Sec. 6149 (1956) and 60 Stat. 27, 10 U. S. C. Sec. 0823 (1956) and the jurisdiction of the Court of Claims invoked under 28 U. S. C. 1491 (1948) upon the basis that his conviction and sentence contravened provisions of the United States Constitution as set forth in Article I, Section 8, Clauses 13 and 14 and Amendments V and VI thereof, which it was claimed made Article 2(4) of the Uniform Code of Military Justice, 10 U. S. C. Sec. 802(4) (1958) unconstitutional.

The Court of Claims rejected the claim of the government that petitioner's suit was barred by the doctrines of *res judicata* and collateral estoppel because of the decisions of the Court of Military Appeals and the United States District Court and the affirmance of its decision by the United States Court of Appeals, *United States v. Hooper*, *supra*, and *Hooper v. Hartman*, *supra*.

The Court of Claims upheld the constitutionality of petitioner's sentence and conviction, although expressing doubt on the matter. Appendix A *infra*, page 1 *et seq*

Reasons for Allowance of the Writ.

1. A great many persons are affected by the issues decided in the Court of Claims which have not been but should be settled by this Court.

The subjection of retired members of a regular component of the Armed Forces drawing retirement pay to trial by court martial is of great public importance. There are over 188,000 retired members of a regular component of the Armed Forces who were drawing pay in 1957 and presumably subject to court martial. Clerk's Transcript, Exhibits B and C, to affidavit of Oscar E. Irwin.*

It can be safely assumed that this large number is continually growing because of the necessity to maintain large standing military forces in today's world.

It would appear that if Congress can subject retired regulars drawing pay to court martial, it could extend this military jurisdiction to retired reservists drawing pay. If this is so, persons who never dreamed of such subjections to court martial can be swept into the net of military jurisprudence retroactively by an exercise of Congressional power.

Aside from the large number of citizens directly affected by the Court of Claims decision, there is great importance in the result reached by the Court of Claims because of the effect that it may have on others. It should be obvious that a spouse of a regular member of the service who looks forward to the security of retirement after years of faithful service by her husband would be surprised to find that a misdeed by her husband in civil life after retirement forfeits all right to the security of pay and hospitalization they were enjoying and believed they had earned.

*[illegible] Exhibit B is a list of [illegible] and Exhibit C is a list of [illegible] which is designated by paragraph 4 of the record but not included in the [illegible] Exhibit B leads from the numbers of such persons to components of the Armed Forces.

The necessity of this country to maintain large Armed Forces demands a large number of career men in the services. One of the obvious inducements to making the service a career is the promise of liberal benefits on retirement, as can be observed on any recruiting poster. This inducement is hollow indeed if such benefits may be swept away by reason of conduct in civil life long after completion of an honorable military career.

The precise question of the constitutionality of court martialing retired persons drawing retirement pay has never been decided by this court and in fact is one of first impression in the Court of Claims. Appendix A, *infra*, p. 6.

The Court of Claims itself recognized the question involved here to be:

> "* * * by no means simple one and * * * fraught with elements vital not only to the Armed Forces but to retired personnel as well." Appendix A, *infra*, p. 6.

A final solution of the problem should be made by this court because the Court of Claims ruled only on the dismissal of petitioner and reserved opinion on whether a court martial could sentence a retired person to confinement. However, the Uniform Code of Military Justice is a penal code in the fullest sense and purports to grant the power to incarcerate persons subject thereto on conviction. If the comment that the opinion below was not passing on that power is an implication that the exercise of the power of confining a retired member of the service is illegal, then it invites only further litigation over the constitutionality of court martialing retired regulars.

The expression of some doubts as to the constitutionality of court martialing retired persons in the opinion below, Appendix A, *infra*, p. 9, will also bring further attack on the court martialing of retired personnel unless this court makes a final decision on the question.

Petitioner submits that it is most important that this court resolve a question which so vitally effects a large number of persons and the interests of the United States.

2. The Court of Claims has decided a federal question in a way which is in implied conflict with applicable decisions of this court:

The Court of Claims sustained the constitutionality of Article 2(d) of the Uniform Code of Military Justice largely on the basis of dictum in the case of *United States v. Tyler*, 105 U. S. 244 (1881), that retired officers of the Army were subject to court martial. This assumption of fact, over three-quarters of a century ago, was historically inaccurate.

In 1778 Congress approved a formal plan for the establishment of the Army and provided for seven years half pay for retired and disabled officers. *Worthington C. Ford, Journal of the Continental Congress*, Vol. 11, pp. 95-96 and 502.

The Articles of War passed in 1776 were based on the British military ordinances and Articles of War. Prior to 1893 all British military ordinances and Articles of War remained in force only during the service of troops for whose government they were issued and ceased to operate upon the conclusion of peace. See Military Law under the Uniform Code of Military Justice,

Ancock & Wurfel (1955), University of North Carolina Press, p. 8; Naval Law and History Traced from Earliest Times, Naval Justice, Bureau of Naval Personnel pp. 11, 22 (Oct. 1945). Thus at the time the Constitution was drafted there was no such category as retired personnel entitled to receive pay unless it be in the sense of the provision for seven years half pay. However, these persons were clearly not subject to court martial under the Articles of War which were based on the then existing British Articles of War.

It was not until 1861 that the military was reorganized with provision for subjecting retired officers to the Articles of War (12 Stat. 290). The legislative history of this enactment is set out in Congressional Globe, 37th Cong., 1st Sess. 1861, pp. 16-17, 157-167, 185.

The wide sweeping dictum of *United States v. Tyler*, 105 U. S. 244 (1881), and the decisions in *Runkle v. United States*, 19 Ct. Cl. 396 (1884), rev'd on other grounds, 122 U. S. 543 (1887), *Franklin v. United States*, 29 Ct. Cl. 46 (1893), *Mayan v. United States*, 78 Ct. Cl. 567 (1933), and *Lemley v. United States*, 109 Ct. Cl. 760 (1948), relied on by the Court of Claims, are distinguishable from the instant case.

These decisions which flowed from *United States v. Tyler*, *supra*, involved larger questions of pay to retired officers. They did not involve the constitutional question here presented. The determination that retired personnel are "in" the service for purposes of particular statutes governing computation of the amount of compensation are not persuasive that one is so vitally connected with the Armed Forces that he may be treated as "in" the service for purpose of court martialing him.

where he has been wholly retired for seven years, withdrawn from his command and never recalled to active duty, as in the case of petitioner.

The landmark decisions in *United States ex rel. Toth v. Quarles*, 350 U. S. 11 (1955); *Reid v. Covert* and *Kinsella v. Krueger*, 354 U. S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U. S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U. S. 281 (1960); *Grisham v. Hagan*, 361 U. S. 278 (1960), indicate a pragmatic approach is required to determine if one is "in" the service, so as to be subjected to court martial.

The factors that have been considered controlling can be enumerated as follows:

(1) Relation of defendant to the service;

(2) Status when crime committed;

(3) If punishment possible if there is no military jurisdiction;

(4) Relation of offense to discipline; and

(5) Number affected if military jurisdiction is upheld.

Taking these factors in order as applied to petitioner shows that he was wholly retired in a civilian community, subject to criminal jurisdiction of civil courts, charged with commission of a crime unrelated to discipline, and one of a large number subjected to the military jurisdiction if it is upheld. Thus it is submitted that the Court of Claims in relying on "stale" dictum in *United States v. Tyler*, *supra*, and the alleged factor of pay to petitioner has made a decision conflicting with the latest pronouncements of this court. The position of the Court of Claims that the

decisions in *United States ex rel. Toth v. Quarles*, *supra*, and its companion cases, all involved civilians who were clearly not subject to court martial is to ignore the factors that determined these persons were civilians and not "in" the land or naval forces for purposes of courts martial.

The power of the Court of Claims to the conceptual approach to the problem of seventy-five years ago without regard to the rationale set forth in *Toth* and succeeding cases of recent years creates confusion and doubt again as to the yardstick to be used in determining what persons are subject to court martial.

Conclusion.

For the foregoing reasons and the Court of Claims own expression of the importance of the question, together with its announced doubt of the validity of its decision, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A.

Opinion of the United States Court of Claims.

In the United States Court of Claims No. 212-63 (Decided January 24, 1964).

Selden G. Hooper v. The United States.

Oscar F. Irwin for the plaintiff. William Hilyer on the briefs.

John R. Franklin, with whom was Assistant Attorney General John W. Douglas, for defendant.

Before Jones, Chief Judge, Whitaker, Laramore, Durfee, and Davis, Judges.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Laramore, Judge, delivered the opinion of the court:

Plaintiff, an officer of the Regular Navy, retired for years of service, not on active duty, was charged by naval authorities with violations of the Uniform Code of Military Justice. The charges were based on alleged homosexual acts occurring at a private residence, not a part of any military or naval reservation. Plaintiff, without being recalled to active duty, and over his objection, was subjected to trial by naval court-martial and sentenced to dismissal and forfeiture of all pay and allowances.

On September 25, 1958, the U.S. Court of Military Appeals affirmed the decision of the Board of Review, which Board had affirmed plaintiff's conviction. On January 7, 1961, plaintiff's conviction and sentence were approved and ordered executed by the President of the United States, and payment of plaintiff's retired pay was discontinued as of that date.

Plaintiff brings this suit for retired pay withheld, alleging the unconstitutionality of Article 2(4) of the Uniform Code of Military Justice, 64 Stat. 107, 108; 10 U.S.C. §802 (1958).

Article 2(4) of the Uniform Code of Military Justice, *supra*, provides in pertinent part:

> The following persons are subject to this chapter:
>
> * * * * *
>
> (4) Retired members of a regular component of the armed forces who are entitled to pay.

Plaintiff's case is premised solely on the contention that court-martial jurisdiction is strictly limited to those persons who bear such a proximate relationship to the Armed Forces and their functions as to be reasonably treated as "in" the Armed Forces. Plaintiff argues that the exercise of court-martial jurisdiction over him is unconstitutional since a retired naval officer, for this purpose, does not have such a relationship with the military so that it can be said that he is "in" the Armed Forces. Defendant, on the other hand, contends that the court-martial exercise of jurisdiction over this plaintiff, under Article 2(4) of the Uniform Code of Military Justice, *supra*, is constitutionally valid. As an affirmative defense the defendant alleges that plaintiff's claim is barred by the doctrines of res judicata and collateral estoppel, in view of the fact that plaintiff, throughout the military proceedings, contended that the exercise of jurisdiction over him by that tribunal was unconstitutional. This issue was finally adversely decided against plaintiff by the U.S. Court of Military Appeals in the case of *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958). Consequently, the defendant claims that the doctrine of res judicata should be applied

as a bar to the instant case since the basis for his cause of action in this court is the unconstitutional exercise of jurisdiction over him, which issue has already been adversely decided by the U.S. Court of Military Appeals. The defendant in the alternative contends that if the doctrine of res judicata is not applied, then the plaintiff is collaterally estopped from raising the constitutionality of the exercise of jurisdiction over him, since this issue has already been decided adversely by the military tribunal. The defendant further contends that the present suit is barred by the decision of *Hooper v. Hartman*, 163 F. Supp. 437 (S.D. Cal. 1958), aff'd 274 F. 2d 429 (9th Cir. 1959). This suit was initiated by plaintiff, while the court-martial proceeding was pending, for prohibitory and injunctive relief against the Commandant of the Naval District challenging the exercise of court-martial jurisdiction over him.

We disagree with defendant's contentions regarding res judicata and collateral estoppel.

First, we turn to plaintiff's suit in the District Court which was affirmed by the Court of Appeals. In that case, the Court of Appeals merely held that as the process of review of plaintiff's conviction provided by the Uniform Code of Military Justice had not yet been completed, the civil courts were without jurisdiction so long as the military remedies remained unexhausted. Consequently, it cannot be said that that decision is a bar to the present suit since the constitutional issue was never decided by the Court of Appeals, although the lower court had passed on the issue. The reviewing court merely stated that it lacked jurisdiction to hear the case, since it was implicit in the trial court's decision that plaintiff had failed to exhaust his military remedy.

We turn now to the decision of the U.S. Court of Military Appeals. We are taught by the Supreme Court that before the doctrine of res judicata is applicable as a bar to a second suit, not only must the parties be the same but also the second suit must be upon the same cause of action or demand as the original. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Clearly this case is not between the same parties, and it is based entirely on a different cause of action or demand. Thus, the doctrine of res judicata cannot be applied to the case at bar.

Collateral estoppel, on the other hand, applies where the second cause of action is between the same parties but upon a different cause or demand. As the Supreme Court has stated:

> In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Commissioner v. Sunnen*, *supra*, at 598.

We are also mindful of the fact that the application of res judicata and collateral estoppel is not required by constitutional law doctrines, but each is a judicially developed restriction invoked in the name of public policy requiring that a litigant be given only one day in court (*Commissioner v. Sunnen*, *supra*, at 597; *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931)). It appears that where the public policy requiring the application of res judicata and collateral estoppel is outweighed by overriding considerations like Federal pre-emption (*Kalb v. Feuerstein*, 308 U.S. 433

(1940)), or sovereign immunity (*United States v. United States Fidelity Co.*, 309 U.S. 506 (1940)), the Court has not adhered to the finality that would otherwise be given to the prior decree. We believe that an example of such an overriding consideration is present here, since a party should be given his day in a court from which review by the Supreme Court might ultimately be afforded.[1] This was not present in the instant case because of the finality given to the decisions of the Court of Military Appeals. Article 76 of the Uniform Code of Military Justice, 64 Stat. 107, 132, 10 U.S.C. § 876 (1958). The possibility of review by the Supreme Court was not present or available. In situations where the conviction by the military tribunal results in the incarceration of the defendant, review of the constitutional exercise of jurisdiction is by way of habeas corpus proceedings to the U.S. District Court. *E.g., McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960). However, in the instant situation plaintiff's conviction did not result in his confinement, so that this avenue of review was not open to him. The plaintiff's only remedy was to bring a suit in this court for retired pay withheld alleging the unconstitutional exercise of jurisdiction over him.

Turning next to the constitutional question involved, *i.e.*, whether or not plaintiff, as a retired member of a regular component of the Armed Forces entitled to receive pay, is a part of the land or naval forces "subject to court-martial jurisdiction",

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[1] The Restatement of Conflict of Laws recognizes the possibility of such exceptions where "the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction." Restatement, Conflict of Laws, §451(2) (Supp. 1948). See also *Hunter v. Duke*, — U.S. —, No. 37 (1963), slip op. at 8.

Plaintiff strenuously argues that court-martial jurisdiction is strictly limited to those persons who bear such a proximate relationship to the Armed Forces and their functions as to be reasonably treated as "in" the Armed Forces. In this respect, plaintiff argues that his relationship to the Navy and its functions, rendering him amenable to trial and sentence, was completely lacking in that he had been wholly retired for seven years, withdrawn from his command, and never recalled to active duty.

Defendant, on the other hand, just as vigorously contends that Article 2(4) of the Uniform Code of Military Justice, *supra*, under which plaintiff was tried and sentenced, was constitutionally valid.

The question is by no means a simple one and is fraught with elements vital not only to the Armed Forces but to retired personnel as well. We are aware that whether or not Congress may provide for trial by court-martial of retired Regulars is essentially a question of power. We must turn for such authorization to Article I, section 8, of the Constitution which provides that Congress shall have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." It follows that the power of Congress to provide for trial by court-martial is limited to those individuals who can be said to fall within the definition of "land and naval forces." Therefore, the question before us is whether this plaintiff, a retired officer of a regular component of the Armed Forces, is part of the "land and naval forces" and thus subject to court-martial jurisdiction for illegal acts committed after retirement. Taken in this context, this question is of first

impression.[2] However, courts in the past have had occasion to express an opinion relative to a retiree's connection with the land or naval forces. For instance, the Supreme Court in the case of *United States v. Tyler*, 105 U.S. 244, 245-246 (1881), had this to say:

> The provisions of the statutes, and the uniform treatment of these officers [retired], conform to this view, and necessarily imply that, while not required to perform full service, *they are a part of the army*, and may be assigned to such duty as the laws and regulations permit.
>
> * * * * * *
>
> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service." [Emphasis added.]

As early as 1880, this court, in the case of *Tyler v. United States*, 16 Ct. Cl. 223, affirmed by the Supreme Court, *United States v. Tyler*, *supra*, held that officers on the retired list still remained in the service.[3] Other cases in which this court has expressed a similar opinion on the subject are *Kimball v. United States*, 19 Ct. Cl.

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[2] Compare *Chambers of Ill. v. United States*, 102 F. Supp. 425, 426, 120 Ct. Cl. 106 (1951), involving acts committed by a retiree prior to retirement.

396 (1884), reversed on other grounds, 122 U.S. 543 (1887); *Franklin v. United States*, 29 Ct. Cl. 6 (1893); *Marvin v. United States*, 78 Ct. Cl. 567 (1933); *Lemley v. United States*, 109 Ct. Cl. 760 (1948). Concededly, the above cases do not involve a construction of the statute here in question, but significantly each time the question of connection between a retired officer and the Armed Forces was involved, the courts have responded by expressing an opinion that retired personnel are a part of the land or naval forces and, when called upon, courts have assumed that being part of such forces, court-martial jurisdiction necessarily attaches to them. *E.g.*, *United States v. Tyler*, *supra*, at 246.

Plaintiff places reliance on the Supreme Court decisions in the cases of *Reed v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, *supra*; *Grisham v. Hagan*, 361 U.S. 278 (1960).

In each case above cited, the Supreme Court held the pertinent article of the Uniform Code of Military Justice (Article 2(11)) could not constitutionally be applied to those defendants in the court-martial proceedings, since they were not part of the land and naval forces of the United States.

Article 2(11) of section 802 of the Uniform Code of Military Justice, *supra*, provided:

> The following persons are subject to this chapter:
>
> * * * * *
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to

> any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

We believe all the above cases to be inapposite to the case at bar. In each of the cited cases, the accused were either civilian employees of the Armed forces or dependents of military personnel and clearly not a part of the land or naval forces of the United States. The Supreme Court held that the power of Congress under Article 1, section 8, of the Constitution, "[t]o make rules for the Government and Regulation of the land and naval Forces," taken in conjunction with the necessary and proper clause, does not extend to civilians. These civilians who were subjected to court-martial jurisdiction did not have any direct connection with the operation of the "land or naval forces"; they were never part of the combat troops of the United States, and there was never a necessity to subject them to military discipline.

We believe the function of this court is to uphold an act of Congress unless the same is clearly unconstitutional. In the case at bar, while we have certain doubts, we cannot say that the act is clearly unconstitutional. Consequently, we hold that the exercise of jurisdiction by the military tribunal over this plaintiff was constitutionally valid, since we believe that this plaintiff was part of the land or naval forces. We say this because the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies.

He had a direct connection with the operation of the "land and naval forces." Thus, he formed a part of a vital segment of our national defense and it naturally follows that he should be subject to military discipline. This is in conformity with the decision of the U.S. Court of Military Appeals in the case of *United States v. Hooper, supra*. Moreover, we are persuaded by the language of the Supreme Court in *United States v. Tyler, supra*, wherein it is clear that the Court assumed the exercise of court-martial jurisdiction would be proper. We add that we are concerned in this case only with the power of Congress to provide that a retired officer can be dismissed from the service by a court-martial for offenses against the Uniform Code of Military Justice. We are not concerned with the authority of a court-martial to order the confinement of a retired officer and our holding does not reach that issue.

It naturally follows that since retired personnel are a part of the land or naval forces, they are subject to laws and regulations applicable thereto. Under these circumstances, Article 2(4) of the Uniform Code of Military Justice, authorizing the application of such Code to members on the retired list of the Armed Forces and thereby authorizing their trial by courts-martial, is a valid exercise by Congress of its powers; further, that the application of such jurisdiction to this plaintiff was constitutional and his dismissal from the Navy was a valid exercise of the powers reposed in the President as Commander-in-Chief. Since plaintiff was validly dismissed from the Navy, his entitlement to retired pay no longer exists.

Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and plaintiff's petition is dismissed.

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No. 1030

In the Supreme Court of the United States

OCTOBER TERM, 1963

[redacted] G. HOUSEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
[redacted]
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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1030

SELDEN G. HOOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1–10) is reported at 326 F. 2d 982.

JURISDICTION

The final judgment of the Court of Claims was entered on January 24, 1964. The petition for a writ of certiorari was filed on April 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether Article 2(4) of the Uniform Code of Military Justice is constitutional insofar as it provides

that a retired Naval officer drawing pay is subject to trial by court-martial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 8, Clause 14 of the Constitution of the United States provides in pertinent part:

> Section 8. The Congress shall have Power * * * To make Rules for the Government and Regulation of the land and naval Forces.

Article 2 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 802, provides in pertinent part:

> The following persons are subject to this chapter:
>
> * * * * * *
>
> (4) Retired members of a regular component of the armed forces who are entitled to pay.

STATEMENT

In 1957 petitioner, a retired Rear Admiral of the United States Navy, drawing retirement pay in the amount of $433.83 per month, was charged (R. 1–4, 10)[1] with violation of Article 125 of the Uniform Code of Military Justice, dealing with sodomy,[2] Article 133, dealing with conduct unbecoming an offi-

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[1] "R." refers to the record certified by the Clerk of the Court of Claims and filed in this Court.

[2] ART. 125 (10 U.S.C. 925). "Sodomy.

"(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

"(b) Any person found guilty of sodomy shall be punished as a court-martial may direct."

cer and a gentleman,[4] and Article 134, dealing with acts to the prejudice of good order and discipline and conduct of a nature to bring discredit upon the armed forces.[5] He was alleged to have committed eight specific acts.

After trial by court-martial, petitioner was found to have performed three of the acts charged. Violation of Article 125 was found on the basis of an act of sodomy with an enlisted man of the United States Navy (R. 2, 5, 10)[6]; violation of Article 133 was found on the basis of public association with persons known to be sexual deviates (R. 3, 4, 5, 10)[7]; and violation of Article 134 was found on the basis of an

---

[4] Art. 133 (10 U.S.C. 933). "Conduct unbecoming an officer and gentleman.

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

[5] Art. 134 (10 U.S.C. 934). "General article.

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of that court."

[6] "Specification 3: In that Seldon G. Hooper, Rear Admiral U.S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 3 March 1957, commit sodomy with John Peter Schmidt, personnelman third class, U.S. Navy."

[7] "Specification 2: In that Seldon G. Hooper, Rear Admiral U.S. Navy (Retired), did, at Coronado, California, on or about 4 March 1957, publicly associate with persons known to be sexual deviates, to the disgrace of the armed forces."

indecent act committed with another enlisted man of the United States Navy (R. 3–4, 5, 10).[7]

The court-martial ordered that petitioner be dismissed from the service and forfeit all pay and allowances (R. 5, 10). This sentence was affirmed by a board of review, reversed by the United States Court of Military Appeals for deficiencies in the post-trial review, reviewed and affirmed again by a board of review, and then affirmed by the Court of Military Appeals. *United States* v. *Hooper*, 11 U.S.M.C.A. 128 (R. 5–6, 10). On January 7, 1961, the court-martial sentence was approved and ordered executed by the President (R. 6, 10). Petitioner's retirement pay and allowances were terminated as of that date (R. 7, 11).[8]

At all stages of the proceedings, petitioner preserved his objections to the jurisdiction of the court-martial. This issue was fully discussed and decided adversely to petitioner in the decision of the Court of Military Appeals in the first appeal from the court-martial. *United States* v. *Hooper*, 9 U.S.M.C.A. 637.

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[7] Specification: In that Seldon G. Hooper, Rear Admiral U.S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 3 March 1957, wrongfully commit an indecent, lewd and lascivious act with Roscoe Kurtz Braddock, seaman, U.S. Navy, by embracing the nude body of said Braddock, while he, the said Hooper, was also nude."

[8] The court-martial did not order that petitioner be confined or restrained in any way, and during the trial and review proceedings petitioner was at no time subjected to arrest or to any other form of personal restraint. See pages 5, 63 of the Transcript of Record in *Hooper* v. *Hartman*, 274 F. 2d 429 (C.A. 9) (cited herein as "Appeal Rec."), filed in this Court as Exhibit A to the affidavit of Oscar F. Irwin. See Pet. 6 (footnote).

While the review proceedings were taking place, petitioner attempted a collateral attack in the United States District Court for the Southern District of California. That court refused to interfere with the proceedings on grounds, *inter alia*, that court-martial jurisdiction over petitioner was consistent with the Constitution, and that petitioner had not exhausted his military remedies. *Hooper* v. *Hartman*, 163 F. Supp. 437 (S.D. Calif.). The district court held that the requirement of exhaustion of remedies was properly applicable, since petitioner had not been confined and was not threatened with confinement. The Court of Appeals for the Ninth Circuit affirmed solely on the ground of failure to exhaust remedies. *Hooper* v. *Hartman*, 274 F. 2d 429.

This action was brought in the Court of Claims to recover retirement pay alleged to have accrued from and after January 7, 1961. The Court of Claims granted the government's motion for summary judgment, holding that Article 2(4) of the Uniform Code of Military Justice was constitutional as applied to this case. The court added (Pet. App. 10):

> [W]e are concerned in this case only with the power of Congress to provide that a retired officer can be dismissed from the service by a court-martial for offenses against the Uniform Code of Military Justice. We are not concerned with the authority of a court-martial to order the confinement of a retired officer and our holding does not reach that issue.

ARGUMENT

Article 2(4) of the Uniform Code of Military Justice renders subject to the Code "Retired members of a regular component of the armed forces who are entitled to pay." At the time of the court-martial in issue here, petitioner was a retired officer drawing pay and entitled to wear the uniform and use his military title. These and other connections with the Navy made him a continuing part of that service properly subject to court-martial jurisdiction under the express terms of Article 2(4). The holding of the Court of Claims recognizing the military status of retired officers is consistent with the decisions of this Court and with the historic practice of the armed services.

The decisions of this Court establish that Congress, in exercise of its power under Article I "To make Rules for the Government and Regulation of the land and naval forces," may exert court-martial jurisdiction over "persons who are actually members or part of the armed forces." *Toth* v. *Quarles*, 350 U.S. 11, 14-15. Court-martial jurisdiction has been held to reach a dishonorably discharged soldier in the status of a military prisoner serving a sentence imposed by a prior court-martial. *Kahn* v. *Anderson*, 255 U.S. 1; *Sinclair* v. *Madigan*, 298 F. 2d 742 (C.A. 9), certiorari denied, 370 U.S. 964. On the other hand, the Court in *Toth* invalidated the exercise of court-martial jurisdiction over one who had been honorably discharged and "had severed all relationship with the military and its institutions." *Toth* v.

Guarles, 350 U.S. at 14. Applying the same criteria, the Court rejected the claims of military jurisdiction over dependents and civilian employees accompanying the armed forces abroad in time of peace. *Reid v. Covert*, 354 U.S. 1; *Kinsella v. Singleton*, 361 U.S. 234; *Grisham v. Hagan*, 361 U.S. 278; *McElroy v. Guagliardo*, 361 U.S. 281.

Unlike the individuals in the latter cases, petitioner maintained a continuing connection with the Navy involving military rights, liabilities and duties. As a retired rear admiral, petitioner received substantial pay (10 U.S.C. 6151) and retained the right to wear his uniform on appropriate occasions (10 U.S.C. 772) and to use his rank. He could patronize commissary stores, officers clubs and armed services exchanges (10 U.S.C. 7601–7605) and could obtain medical treatment at armed services medical facilities (10 U.S.C. 1074, 1076). He was subject to obligations and restrictions indicating a substantial connection to the military. Without his consent, he could have been ordered to active duty by the Secretary of the Navy in time of war or national emergency. 10 U.S.C. 6481. Without a new induction, he could have been returned to active duty at any time with his consent. *Ibid.* He was prohibited from earning over $10,000 a year in retirement pay combined with the pay of other government employment. 5 U.S.C. 59a. And he was forbidden to represent any person in the sale of anything to the Department of the Navy. 18 U.S.C. 281; P.L. 87–849, 76 Stat. 1126. Petitioner's connection with the Navy was not a merely theoretical matter. In 1949—after his retirement—the Chief of Naval Per-

sonnel specifically authorized him to wear his uniform on appropriate occasions while employed as Superintendent of the West Coast Naval Academy (Appeal Rec. 45).*

Based upon these military rights and duties, the Congress and this Court have, from the time the retired list was first established, consistently recognized retired officers as part of the land or naval forces. Thus, in *United States* v. *Tyler*, 105 U.S. 244, 246, the Court held that retired officers "are in the military service * * * and that the increased pay of ten percent for each five years' service applies to the years so passed * * *." In words that forecast the holding of the Court of Claims in this case, the Court stated (*id.* at 246):

> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be

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* With such ties, the Navy could reasonably conclude that petitioner's conduct could bring the service into disrepute and accordingly warranted his dismissal. A court-martial proceeding was the only way in which petitioner could be dismissed. 10 U.S.C. 1161 provides as follows:

"(a) No commissioned officer may be dismissed from any armed force except—

"(1) by sentence of a general court-martial;

"(2) in commutation of a sentence of a general court-martial; or

"(3) in time of war, by order of the President.

"(b) The President may drop from the rolls of any armed force any commissioned officer (1) who has been absent without authority for at least three months, or (2) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final."

> borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service.

To the same effect, see *Badeau* v. *United States*, 130 U.S. 439,[10] and *United States* v. *Gay*, 264 U.S. 353. In *Kahn* v. *Anderson*, *supra*, 255 U.S. at 6–7, the Court reaffirmed its ruling in *Tyler*, holding that retired officers "are the officers in the military service of the United States" qualified to sit as members of a military court-martial. Other courts have reached the same conclusion in a variety of contexts. *Hostinsky* v. *United States*, 292 F. 2d 508 (Ct. Cls.); *Morgenthau* v. *Barrett*, 108 F. 2d 481 (C.A.D.C.); *White* v. *Treibly*, 19 F. 2d 712 (C.A.D.C.); *United States* v. *Giltmore*, 189 Fed. 761 (S.D.N.Y., Hand, J.); *Franklin* v. *United States*, 29 Ct. Cls. 6; *Runkle* v. *United States*, 19 Ct. Cls. 396, reversed on other grounds, 122 U.S. 543.

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[10] Under a statute prohibiting receipt of compensation for two offices in the government, the Court held that a retired army officer was not entitled to retirement pay for the periods in which he served abroad as a consul general. Despite cases which held that double compensation was permitted where the two offices were not "incompatible," the Court held that retired army officers holding diplomatic or consular appointments could not receive "pay as army officers during the period of time when they are absent from their country in the discharge of continuous official duties inconsistent with subjection to the rules and articles of war and the other incidents of military service." 130 U.S. at 451–452.

The issue presented here—whether court-martial jurisdiction may be exerted over retired officers—has not been extensively litigated, presumably because the military has exercised such jurisdiction only in rare cases.[11] However, those courts which have faced the question have upheld the jurisdiction. *Closson* v. *Armes*, 7 App. D.C. 460; *Chambers* v. *Russell*, 192 F. Supp. 425 (N.D. Calif.); cf. *United States ex rel. Pasela* v. *Fenno*, 167 F. 2d 593 (C.A. 2), certiorari granted, 334 U.S. 857, dismissed by stipulation of counsel, 335 U.S. 806 (in this case court-martial juris-

[11] In practice, the armed services recognize that retired personel are not "in" the service to the same extent as personnel on active duty and accordingly limit the circumstances in which court-martial jurisdiction given by the Uniform Code of Military Justice can be exercised. This policy was set forth in 1931 by Secretary of War Hurley in a letter to President Hoover recommending disapproval of a court-martial sentence of a retired Army officer. *United States* v. *Kearney*, 3 J.A.G.D. Board of Review 63, 79, C.M. 190711. This letter contained the following statement:

"It has been the immutable custom of the service that officers when retired, unless some extraordinary circumstances were involved linking them to the military establishment or involving them in conduct inimical to the welfare of the nation, would be subject only to the same police restrictions and jurisprudential processes as the ordinary civilian."

The Air Force requires prior approval of the Secretary of the Air Force before court-martial jurisdiction may be exercised over a retired person. The Air Force has exercised this jurisdiction in only one case. (An exception to this requirement is made in cases of personnel cashing worthless checks at United States military facilities abroad under circumstances evidencing fradulent intent.) The Navy requires prior approval of the Secretary of the Navy. Department of the Navy, *Manual of the Judge Advocate General*, Sec. 0106 c.(2)(a). The Army continues to follow the policy laid down in *Kearney*.

diction was exercised to put the relator in custody after recall to active duty for the sole purpose of court-martial); *Taussig* v. *McNamara*, 219 F. Supp. 757 (D.D.C.). Similarly, Colonel Winthrop, while expressing doubts about the jurisdiction over civilians generally, concludes "That retired officers are a part of the army and so triable by court-martial—a fact indeed never admitting of question * * *."[12]

The early origins and importance of court-martial jurisdiction over retired officers were stressed by President Wilson as grounds for vetoing a bill which would have terminated this jurisdiction. 53 Cong. Rec. 12844, quoted in *United States* v. *Hooper*, 9 U.S.M.C.A. 637, 643–645. The President pointed out that officers on the retired list are "members of the Army, officers of the United States, exemplars of discipline, and have in their keeping the good name and the good spirit of the entire Military Establishment before the world. Occupying such a relation, their subjection to the rules and Articles of War and to trial by general court-martial have always been regarded as necessary, in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and

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7 Dig. Ops., Courts-martial, § 45.8. Since the *Kearney* case, no retired army personnel have been court-martialed. (Some retired army personnel have been called back to active duty for purposes of court-martial for offenses committed during prior active duty. No such case has taken place since October 1953—two years before the decision in *Toth* v. *Quarles*, 350 U.S. 11.)

12 Winthrop's *Military Law and Precedents* (2d ed., 1920 reprint), p. 87, n. 27.

impair that control over those forces which the Constitution vests in the President."

The ruling of the Court of Claims in this case properly gives effect to this history and unbroken line of decisions. Petitioner cites no case which impairs these authorities or is inconsistent with the rationale of the decisions. The recent decisions, as pointed out, depend upon the individual's civilian status or complete severance of all relationships with the military. Indeed, Mr. Justice Black's opinion in *Reid* v. *Covert*, 354 U.S. 1, concurred in by three other Justices, explicitly recognized that the boundary between "civilians" and "members of the 'land and naval forces'" is not a clear one, and indicated that the latter category might include a person who had not been formally inducted into the military and did not wear a uniform (354 U.S. at 22–23). Mr. Justice Harlan, likewise concurring was emphatic in his view that, under Article I, military jurisdiction extends beyond those in actual service as soldiers in the armed forces (354 U.S. at 70–71).

There is thus no conflict of authority among applicable decisions of this Court or other courts. In this case, moreover, there was no personal restraint imposed at any stage of the proceedings. Petitioner's punishment was limited to dismissal from the service and termination of pay received as a result of that status. There is no occasion to consider questions not directly presented, for example, whether the jurisdiction conferred by Article 2(4) could validly be ex-

ercised to sentence a convicted defendant to a fine or imprisonment. This Court has consistently refused invitations to consider the constitutionality of statutes as applied to situations not before the Court. *United States* v. *Raines*, 362 U.S. 17.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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